Low-Level Equal Protection: The Scope and Logic of Deferential Review

By R. George Wright*

Introduction

One of the most frequently litigated constitutional issues is the alleged governmental denial of the equal protection of the laws mandated by the state or federal constitution. In a large subset of these cases, the objecting party does not claim that the allegedly unconstitutional governmental classification is drawn along historically suspect[1] or even quasi-suspect lines.[2] Indeed, the objecting party does not usually even claim that the classification burdens some constitutionally fundamental right.[3] The objecting party is thus unable to cite any widely recognized justification for especially intensive judicial scrutiny of the classification.

Even in the admitted absence of any such traditional reason for heightened judicial scrutiny, however, the Supreme Court and, to an even greater degree, state supreme courts, have developed and applied to varying effect a remarkably diverse array of equal protection tests. Arguably, some divergence in the

---

* Associate Professor of Law, Cumberland School of Law, Samford University.

[1] *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (discrimination on the alleged basis of ethnicity); United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (Justice Stone, in his historic footnote, posed, but did not answer, the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[2] *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (gender-based classification must have substantial relationship to achieving important government objectives).

[3] *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (constitutionally fundamental right of suffrage triggered heightened judicial scrutiny).

precise verbal formulation of an essentially uniform "low-level scrutiny" test is inevitable, and no great significance should be attributed to minor terminological differences. In practice, however, the diversity among ostensibly "low-level scrutiny" formulations leads to great diversity in the degree of judicial deference accorded to the legislative classification, and to great diversity of result on the equal protection challenge itself.

This Article provides some sense of the range of crucial differences among the "low-level scrutiny" equal protection formulas. It argues that in the absence of suspect or quasi-suspect classifications, or the burdening of constitutionally fundamental rights, when those persons ultimately burdened by a statutory classification are not concretely identifiable in advance by the legislators, courts are justified only in imposing the very least demanding, most deferential variety of low-level equal protection tests. The "loosest"[4] of the low-level equal protection formulas should not be interpreted, however, as inviting judicial abdication, or a rubber-stamping of the legislative classification, and most certainly does not create a meaningless test which will be invariably met. The "loosest" among plausible low-level equal protection formulas should still be a coherent, nontautological, and significant test that is not without "teeth." Such a formulation is suited for an appropriate role in striking down illegitimate classifications, or classifications not plausibly justifiable on the basis of any sort of broad, public interest-oriented considerations. That same formulation should not, however, be used as an instrument for judicial usurpation of the legitimate purview of the legislature, especially when there exists no reason to suppose that the legislative classification resulted from an undemocratically defective or tainted legislative process.

I. THE RANGE OF LOW-LEVEL SCRUTINY FORMULAS

Probably the most familiar element among low-level scrutiny equal protection formulas is the requirement that the classification, or the classificatory scheme, be " 'rationally related to a

[4] "Looseness" is here intended to suggest the most deferential, least stringently formulated tests for equal protection. *See infra* note 7 and accompanying text.

legitimate state interest.'"[5] The Supreme Court is susceptible to different moods, and these moods are often reflected in different formulas. Such moods can, with time, decisively affect judicial results.[6]

In a deferential mood, the Court has said that the "constitutional safeguard" of equal protection is

> offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[7]

In a less deferential mood, the Court has held that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[8]

Plainly, these formulas are not logically equivalent. The latter is on its face more stringent, the former more lenient. Consider, for example, the case of a statutory classification that is imperfectly drafted, in the sense that some few persons similarly situated with respect to the goals of the statute are differently classified and differently treated. Such a classification could presumably pass the more lenient test, despite the presence of "some inequality." The same classification should fail the more stringent test, however, since logically not "all persons similarly circumstanced" are "treated alike." Arguably, the connection between the classification and the statutory aims, i.e., the logic of the classification, need only be "conceivable" under the more lenient formulation, but must be supported[9] by at least some

---

[5] Pennell v. City of San Jose, 108 S. Ct. 849, 859 (1988) (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

[6] *See* text accompanying notes 7-8 *infra*.

[7] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[8] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[9] While there is a presumption that the classification is not violative of the equal protection clause, *see McGowan*, 366 U.S. at 425-26, the burden of proof is, in practice, often on the government to advance the requisite statutory purposes, lest the challenging

consideration of actual states of affairs under the more stringent test. These differences in logic are reflected in judicial practice. Not surprisingly, courts finding an equal protection violation on the basis of "low-level scrutiny" incline toward one or another variant of the relatively stringent test quoted above, rather than the more lenient formula or some variant thereof, as we shall see below[10] at length.

To develop a sense of the variety and range of the lenient and stringent low-level scrutiny tests, one might note the difference between what might be called "simple" tests and "compound" tests. A classification tested by the presence of a rational relationship to a legitimate state interest[11] contains but two elements: the legitimacy of the state interest,[12] and the rationality of the relation between the interest and the classification.[13] Compound tests, on the other hand, might include, as conjunctive requirements, elements such as the reasonableness of the classification, the nonarbitrariness of the classification, a fair and substantial relation between the classification and its object, and a requirement that persons similarly situated be treated alike.[14] There may well be substantial overlap in practice among some of the conjunctive elements of a compound test. One might be forgiven for imagining, for example, that a requirement of reasonableness will often tend to render a requirement of nonarbitrariness largely superfluous, and vice versa. The frequently repeated judicial language of the compound tests should not, however, be treated as involving mere surplusage. Unfortunately, though, the more that courts are inclined to give at least some independent effect to each literally distinct element of a conjunctive formulation, the greater the chances for the classifica-

---

party be saddled with the task of negating all of the possible purposes; *see, e.g., Pennell*, 108 S. Ct. at 859; Hooper v. Deukmejian, 176 Cal. Rptr. 569, 585 (Ct. App. 1981) ("defendants have advanced no rational basis for the classifications"). *But cf.* Jones v. State Bd. of Medicine, 555 P.2d 399, 407 (Idaho 1976) (burden of showing absence of reasonableness of relation on challenging party).

[10] *See infra* notes 11-59 and accompanying text.

[11] *E.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (requiring only that "the classification challenged be rationally related to a legitimate state interest").

[12] *Id.* at 304.

[13] *Id.* at 305-06.

[14] *E.g., F.S. Royster Guano Co.*, 253 U.S. at 415.

tion being struck down through judicial intrusion into the legislative sphere.

The easiest way to show that compound formulas tend to be less deferential, and more demanding, than simpler formulas is to note that some simple formulas are essentially subsets of some compound formulas. For example, there is, as noted above, authority for the view that low-level scrutiny requires consideration only of whether the classification is rationally related to a legitimate state interest.[15] This test, as formulated, however, is merely one component of a compound test that asks, for example, whether "the statutory classification has some rational basis in fact and bears a rational relationship to legitimate governmental objectives."[16] Such compound tests are genuinely intended to be more rigorous than even those component elements that might suffice by themselves.

> [T]here are two separate and distinct prongs to the rational basis test. The first prong of the test has been formulated as requiring that "the classification is reasonable, not arbitrary," . . . or that "the statutory classification has some rational basis in fact. . . ." The second prong requires either that "the statutory classification . . . bear[s] a rational relationship to legitimate state objectives," . . . or that it be "reasonably related to a legitimate governmental interest."[17]

Thus, compound tests are not merely "simple" tests adorned with decorative repetition and stylistic flourishes, they are typically more demanding.

The compound formulas vary significantly among themselves. Both state and federal courts have, over a substantial span of modern constitutional history, often adopted the formula that requires that the classification " 'be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[18]

---

[15] *See supra* note 5 and accompanying text.

[16] Austin v. Litvak, 682 P.2d 41, 49 (Colo. 1984) (en banc).

[17] *Id.* at 50 (citations omitted).

[18] Brown v. Merlo, 506 P.2d 212, 216, 106 Cal. Rptr. 388, 392 (1973) (en banc) (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971)); *see F.S. Royster Guano Co.*, 253 U.S. at 415.

Other compound formulas differ substantially, as for example, the "minimally" compound test upholding the classification unless it is "shown to be palpably arbitrary and without a sound basis in reason."[19] Another "minimally" compound test upholds classifications that "are not patently arbitrary and bear a reasonable relationship to a legitimate government interest."[20]

The various compound tests for low-level equal protection scrutiny run the risk of being treated as, at best, internally redundant or in part merely rhetorical. At worst, such tests may invite not merely a serious judicial inquiry into the constitutionality of the classification, but a judicial re-weighing of the competing public policies or of the weight of the complex empirical evidence undergirding legislative presuppositions of fact. Such judicial re-weighing or second-guessing in many cases involving low-level equal protection is not jurisprudentially appropriate.[21] Standards such as "patent" or "palpable" arbitrariness seem suitably restrained and deferential to legislative judgment. The vagueness and ambiguity of a term like "arbitrary" may serve, however, as the entering wedge for decidedly nondeferential judicial recalculations of fairness, equity, sound public policy, and the weight of the public interest.[22]

---

[19] People v. Superior Court, 241 Cal. Rptr. 322, 326 (Ct. App. 1987) (quoting Whittaker v. Superior Court, 438 P.2d 358, 367, 66 Cal. Rptr. 710, 719 (1968)).

[20] Arneson v. Olson, 270 N.W.2d 125, 133 (N. D. 1978) (dicta).

[21] For a traditional statement of the logic of judicial restraint, see Farmers Ins. Exchange v. Cocking, 628 P.2d 1, 3, 173 Cal. Rptr. 846, 848 (1981) (en banc) ("the Legislature's decision . . . is supported by a variety of rational, legitimate reasons. That we may disagree with some or all of these reasons affords no justification whatever for the substitution of our own view of what is proper public policy for that of the Legislature").

[22] It is perhaps rhetorically unfair, yet tempting, to note that an inquiry into "arbitrariness," among other considerations, was undertaken by the majority in the generally discredited substantive due process case of Lochner v. New York, 198 U.S. 45, 56 (1905). Unattractive ideology or public policy may be thought of as not merely ill-advised, but "arbitrary." *See id.* For additional recent examples of the use of an "arbitrariness" criterion in low-level scrutiny cases, see Times Mirror Co. v. City of Los Angeles, 237 Cal. Rptr. 346, 354 (Ct. App. 1987), *appeal dismissed*, 108 S. Ct. 743 (1988); Capitol Records, Inc. v. State Bd. of Equalization, 204 Cal. Rptr. 802, 813 (Ct. App. 1984); McCaffrey v. Preston, 201 Cal. Rptr. 252, 258 (Ct. App. 1984) (expressly defining a classification as not arbitrary "if any set of facts reasonably can be conceived that would sustain it," thereby rendering an arbitrariness inquiry utterly redundant in any of a wide variety of low-level equal protection formulas); Jones, 555 P.2d at 407; Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) (any recovery

The above point is made clearer by examining alternative formulas where such potential for judicial hubris is more obvious. Some courts, for example, have seized upon, or been misled by, an ambiguity in the term "discrimination." One classically deferential formulation is that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[23] This deferential formulation changes character, though, if it is assumed to license an inquiry by the court into whether or not a legislative classification is "discriminatory." The phrase "statutory discrimination" is plainly intended to be synonymous merely with "statutory classification," and is used neutrally. The term "discriminatory" is of course also used in a pejorative sense, implying disapproval. Courts that make an independent inquiry into whether a statutory classification is "discriminatory" or not[24] are adopting this latter interpretation. "Discrimination" in this sense is, however, quite often perilously subjective. Whether, for example, limitations on remedies and recoveries in medical malpractice actions[25] or the classifications established by automobile guest statutes[26] are "discriminatory" or not will inevitably tend to reflect the tastes and sentiments of the court deciding the issue.

A judge's interpretation of a legislative enactment "in accordance with his personal conception of right and wrong, sound and unsound policy"[27] is often thought to be illegitimate. Tests permitting the constitutionality of the classifications to depend, even in part, on essentially unconstrained judicial determinations

---

"permitted or denied on an arbitrary basis" creates a "special privilege" in violation of Illinois Constitution); Henry v. Bauder, 518 P.2d 362, 365 (Kan. 1974) ("arbitrarily" created classifications violate the "principle of equality").

[23] McGowan, 366 U.S. at 426.

[24] *See, e.g., Jones*, 555 P.2d at 406-07. *Jones* requires a showing "that the statute under attack creates a discriminatory classification." *Id.* at 406. *Cf. Arneson*, 270 N.W.2d at 137 (statutory classification violates due process requirements in part because of its discriminatory character). The court in *Henry* literally required that the legislative classification not be "created" discriminatorily. *Henry*, 518 P.2d at 365. This appears to be aimed not at the fairness of the classification itself, but at the fairness of the legislative process creating the classification. *See id.*

[25] *See, e.g., Jones*, 555 P.2d at 406-07.

[26] *See, e.g., Henry*, 518 P.2d at 367-68.

[27] Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 200 (1986).

of vague and ambiguous standards such as arbitrariness or discrimination also serve inevitably to expand the judicial role. Paradoxically, governmental arbitrariness is increased by the mind and will of judicial decisionmakers who are only weakly responsible to the electorate, and who are often only informed by preconception and by partisan, adversary briefs. Perhaps not surprisingly, at least one court has interpreted the current low-level equal protection case law to "[call] upon the judge's personal understanding of the needs of society."[28]

This process of gradual transference of effective authority from the legislature to the courts is of course predominantly not a matter of willful usurpation. Even some courts that inquire into whether the legislative classification is "discriminatory" apparently intend only a narrow inquiry, readily withstood by most classifications, as indicated by the frequent qualification that the discrimination be "invidious."[29] The term "invidious" may often be intended in a restrictive sense, as to imply, perhaps, "obvious" or "blatant" discrimination.[30] This restriction unfortunately appears to be of little independent force, and may in fact in the minds of some courts add nothing at all beyond what is already implied by "discrimination."[31]

Some formulations that are evidently intended to be quite restrictive of judicial prerogative are nonetheless unduly susceptible of abuse through later judicial expansion. One court, for example, has observed that "[t]he Legislature had wide discretion . . . and any possible resulting classifications . . . may only be overthrown by a clear affirmative showing that they were palpably arbitrary and beyond rational doubt, erroneous."[32] De-

---

[28] Deibler v. City of Rehoboth Beach, 790 F.2d 328, 334 n.1 (3d Cir. 1986).

[29] *See, e.g.*, People v. Romo, 534 P.2d 1015, 1020, 121 Cal. Rptr. 111, 116 (1975) (en banc); *Jones*, 555 P.2d at 407; *Henry*, 518 P.3d at 365.

[30] *See Jones*, 555 P.2d at 407.

[31] *See, e.g.*, Kirk v. Board of County Comm'rs, 595 P.2d 1334, 1336-37 (Okla. 1979); Eaton v. State, 363 A.2d 440, 441, 441 n.2 (Del. 1976). *Cf.* Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1049 n.2 (1979) (the Supreme Court used "the words 'arbitrary,' 'capricious,' and 'invidious' apparently as alternative formulations of the rationality requirement").

[32] Riverside Steel Const. Co. v. William H. Simpson Const. Co., 227 Cal. Rptr. 424, 429 (Ct. App. 1985) (en banc) (citation omitted), *petition for review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

spite its literal restrictiveness, this formulation focuses crucially on a largely unconstrainable "arbitrariness" determination and on a strong showing that the classification is somehow "erroneous." Of course, a classification literally cannot be erroneous, since it is a legislative act, rather than an assertion of fact. The formulation therefore invites a potentially broad judicial inquiry into whether any relevant errors of empirical fact or of logic attended the legislative determination.

A court might, for example, find by clear and convincing evidence that a classification is somewhat overinclusive or underinclusive with respect to its purpose, and is therefore clearly based on a legislative "error." One commentator has suggested that a classification is intelligible, on traditional equal protection grounds, only if it is "predicated on an objective difference between those included in the classification and those not included, which is relevant to the policy decision government purports to be implementing. . . ."[33] This standard allows substantial scope for judicial manipulation. It probably goes too far to suggest that "it is always possible for a court to define the evil or the good at which legislation is aimed so as to make the statutory classifications too broad or too narrow for achieving the purpose thus defined."[34] As we shall see below,[35] a court can ascribe purposes to a statute with greater, or lesser, plausibility although some alleged purposes will be less credible than others. It is also a substantial oversimplification to suggest that under a low-level equal protection standard, "even grossly overinclusive classifications are permissible, despite the price that is paid by the innocent, but included, bystander."[36]

The California Supreme Court in *Brown v. Merlo*,[37] for example, struck down an automobile guest statute on state and federal equal protection grounds as an impermissibly overinclu-

---

[33] Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979).

[34] Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 137 (1972).

[35] *See infra* notes 97-109 and accompanying text.

[36] Farrell, *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 ARK. L. REV. 1, 17 (1988); *see* Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 783 (1987).

[37] 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (en banc).

sive classification.[38] The policy supporting this position is that overinclusive classifications reach beyond the individuals actually deserving of the burden imposed by the classification.[39] Such classifications are said to " 'fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association.' "[40] This admittedly grossly overinclusive[41] classification was thus condemned[42] substantially for reasons that are not confined only to grossly overinclusive classifications. To hold only a few persons guilty by association may be nearly as objectionable in principle as holding many persons guilty by association.

Courts inclined to use an overinclusiveness/underinclusiveness analysis in an aggressive fashion can draw substantial support from the related moral and legal principle[43] that like persons or cases should be treated alike, or that persons similarly situated with respect to a statutory classification should be similarly classified. Both the United States Supreme Court[44] and a number of state supreme courts[45] have held that one component of the

---

[38] *Id.* at 227-29, 106 Cal. Rptr. at 403.

[39] *Id.*

[40] *Id.* at 227, 106 Cal. Rptr. at 403 (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 351-52 (1949)).

[41] The statutory classification was held underinclusive with regard to the statutory aim of preventing fraud. *Id.* at 228 n.17, 106 Cal. Rptr. at 404.

[42] For analogous logic, see Fein v. Permanente Medical Group, 695 P.2d 665, 692, 211 Cal. Rptr. 368, 395 (1985) (en banc) (Bird, C.J., dissenting), *appeal dismissed*, 474 U.S. 892 (1985); Hays v. Wood, 603 P.2d 19, 34, 160 Cal. Rptr. 102, 117 (1979) (en banc) (Mosk, J., concurring) ($1,000 threshold fee reporting requirement for attorney-officials underinclusive). *But cf. In re* Arthur W., 217 Cal. Rptr. 183, 188-89 (Ct. App. 1985) (the court, without undertaking an analysis of overinclusiveness or underinclusiveness of the age-based classification, upheld a statute providing for a substantially longer minimum license revocation period for juvenile DUI offenders than for adults committing the same offense).

[43] *See* ARISTOTLE, THE POLITICS 129-30 (E. Barker trans. 1971); R. HARE, FREEDOM AND REASON 48-49 (1963) ("a moral judgement about my own case implies a similar judgement about similar cases in which other people are involved. . . ."); Tussman & tenBroek, *supra* note 40, at 346. *But see* N. RESCHER, DISTRIBUTIVE JUSTICE 57-58 (1966) (modest qualifications suggested).

[44] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co.*, 253 U.S. at 415).

[45] *See, e.g., Romo*, 543 P.2d at 1020, 121 Cal. Rptr. at 116; *Jones*, 555 P.2d at 407; *see also* People v. Carrillo, 208 Cal. Rptr. 684, 690 (Ct. App. 1984); Far West Services, Inc. v. Livingston, 203 Cal. Rptr. 486, 493 (Ct. App. 1984); Georgie Boy Mfg., Inc. v. Superior Court, 171 Cal. Rptr. 382, 386 (Ct. App. 1981).

equal protection inquiry requires that all persons similarly situated must be classified or treated alike.

This approach, however popular and authoritative it may be, is fraught with difficulties. First, the test, as ordinarily applied in practice, is impossible to satisfy. Few statutory classifications can be expected to be perfect in application so as only to burden or to benefit those classes of individuals targeted by the legislature. Courts may well recognize this, but a court that is inclined to strike down a classification based merely on a policy disagreement may find little to constrain it from finding the departure from legislative perfection to be "excessive." Second, a court that is unsympathetic with the policy underlying the classification may well be able to manipulate the legal determination of the parameters of the classification. It will not always be obvious which characteristics relevantly differentiate one person from another. Third, and more generally, it is difficult to interpret the meaning of an injunction requiring similarly situated persons to be treated similarly. Should this be a mere component of an equal protection test, rather than the very essence of such a test? The principle of treating like cases alike is the touchstone of mainstream Western theories of ethics and distributive justice.[46] Is the principle, however, of any practical use? Is such a principle perhaps merely vacuous and uninstructive until "filled in" in one controversial fashion or another?[47]

Regardless of how these divergent perspectives on the "similarly situated" requirement are eventually sorted out, it seems inevitable that the greater the independent role accorded to this test in equal protection jurisprudence, the greater the potential

---

[46] *See* ARISTOTLE *supra* note 43 and accompanying text.

[47] *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). This article is discussed in a series of articles and replies: Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Comment: Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Greenawalt, *How Empty is the Idea of Equality*, 83 COLUM. L. REV. 1167 (1983); Westen, *To Lure the Tarantula From Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

for licensing judicial vetoing of statutory classifications that are merely unappealing to the reviewing court. At best, the "similarly situated" requirement can serve as the framework for a broad ethical principle by which any judicial equal protection formula can be evaluated. If courts insist on using the "similarly situated" principle in a legal and not merely philosophical role, they should make an effort to neutralize or to contain its potential for abuse. One California court[48] has attempted just such neutralization. The court agreed that equal protection requires that persons similarly situated, with regard to what it referred to as "the legitimate purpose"[49] of the classification, be treated alike. The court nonetheless qualified and limited the scope of that requirement by declaring that equal protection "does not preclude a state from making some distinctions as long as they are reasonable and not arbitrary."[50] Although it is true that an arbitrariness test is an insufficiently reliable bulwark against judicial imperialism, the court is correct in its basic notion of limiting the scope and force of the "similarly situated" principle by establishing a "trumping" principle recognizing broad legislative discretion.[51]

One final, noteworthy approach to low-level equal protection de-emphasizes the importance of the precise linguistic formulation of the test, as long as the test is understood to require " 'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.' "[52] This approach assumes that it is possible to bypass the necessity of choosing between formulas requiring, for example, that the classification bear only some rational relationship to a merely con-

---

[48] Stroh v. Midway Restaurant Systems, 226 Cal. Rptr. 153 (Ct. App. 1986).

[49] *Id.* at 159.

[50] *Id.*

[51] *See, e.g., Pennell*, 108 S. Ct. at 859 (Congress need not burden precisely everyone, for otherwise arguably no one within a category would be implicated by the adopted purpose of the statute).

[52] Newland v. Board of Governors, 566 P.2d 254, 258, 139 Cal. Rptr. 620, 624 (1977) (en banc) (quoting Dorrough v. Estelle, 497 F.2d 1007, 1011 (5th Cir. 1974), *rev'd*, 420 U.S. 584 (1974)). See also the cases collected in Serrano v. Priest, 226 Cal. Rptr. 584, 606 n.15 (Ct. App. 1986), *vacated*, 723 P.2d 1248, 229 Cal. Rptr. 663 (1986) (en banc).

ceivable state interest, or that the classification rest on a difference fairly and substantially related to the statutory purpose.[53]

This assumption, though, is questionable. A test requiring only a showing of rationality of relationship to a conceivable state interest is less demanding than the "fair and substantial" relationship test, and will be met by some classifications unable to meet the latter formulation. That the courts have not uniformly settled on one formulation to the exclusion of the other[54] hardly shows that they are interchangeable. The cynically inclined might even imagine that both lax and stringent formulas have persisted precisely because of their divergent implications, thus allowing the courts maximum discretion in ensuring that equal protection cases need not be decided contrary to their own policy preferences.

The "serious and genuine inquiry" standard may have been intended as a "move away from"[55] more traditional equal protection tests, but in logic and practice it is inevitably tied to such tests. The primary problem is that the defenders of relatively lax and deferential tests can claim that their favored formulas also require a "serious and genuine inquiry" into the connection between classification and goals. That a test is ultimately narrow and deferential does not mean that it is not serious and genuine, as the Supreme Court has reminded us.[56] The courts adopting the "serious and genuine inquiry" approach appear to concede this point,[57] although it seems possible that the intent underlying the "serious and genuine inquiry" approach was in fact to favor a more restrictive, less deferential approach. Greater restrictiveness, however, has not been the uniform result of the "serious and genuine inquiry" test. Courts applying the "serious and

---

[53] *See, e.g.*, American Bank & Trust Co. v. Community Hosp., 660 P.2d 829, 837, 190 Cal. Rptr. 371, 379 (1983), *vacated*, 683 P.2d 670, 204 Cal. Rptr. 671 (1984); *Hooper*, 176 Cal. Rptr. at 581.

[54] *Newland*, 566 P.2d at 257, 139 Cal. Rptr. at 623.

[55] Talley v. Municipal Court, 150 Cal. Rptr. 743, 746 (Ct. App. 1978).

[56] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("[a]lthough [the court's] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one" in testing for agency arbitrariness and capriciousness).

[57] *See* Cooper v. Bray, 582 P.2d 604, 608, 148 Cal. Rptr. 148, 152 (1978) (en banc); *Newland*, 566 P.2d at 258, 139 Cal. Rptr. at 624.

genuine inquiry" approach have, for example, upheld statutory classifications on the basis of merely presumed, hypothetical legislative purposes and the reasonable balancing of competing interests.[58] In addition, the "serious and genuine inquiry" approach is neither uniformly cited, nor applied, by all courts nominally bound by precedent to do so.[59]

Ultimately, then, the "serious and genuine inquiry" approach at best shares with the various alternative formulas discussed above an excessive indeterminacy, equivocality, and vulnerability to judicial manipulation. The tests reviewed in this section afford insufficient protection against any judicial impulse to hold unconstitutional those legislative classifications which are merely distasteful, as opposed to those that are subject to legitimate low-level equal protection attack. The examination now turns to the nature and logic of a more uniformly deferential test.

II. THE EX-ANTE NONIDENTIFIABILITY OF THE BURDENED AS AN INDICATOR OF THE LEGITIMACY OF THE CLASSIFICATION

For purposes of analysis, it is usually appropriate to think of most statutory classifications as establishing four categories, although in any given case not all categories may be involved. The four categories may be thought of as including those persons who are or are not distinctively benefitted by the classification and those persons who are or are not distinctively burdened by the classification.[60] Some judges consider the degree of concentration or dispersion of benefits and burdens to be relevant in assessing the constitutionality of a classification, even when the classification is not considered to be suspect.[61] There is good

---

[58] *See Farmers Ins. Exchange*, 628 P.2d at 3, 173 Cal. Rptr. at 849; Barme v. Wood, 176 Cal. Rptr. 42, 48 (Ct. App. 1981), *vacated*, 689 P.2d 446, 207 Cal. Rptr. 816 (1984); *Georgie Boy Mfg., Inc.*, 171 Cal. Rptr. at 386.

[59] *See, e.g.*, Cory v. Shierloh, 629 P.2d 8, 14, 174 Cal. Rptr. 500, 506 (1981) (ultimately concluding that the court's "function is to find, if possible, some means to sustain, not reject" the classifications).

[60] Consider, for example, the complex array of benefits and burdens at issue in Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980) (per curiam) (medical malpractice reform statute).

[61] *See, e.g.*, Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 746 (Ill. 1976) (Underwood, J., concurring in part, dissenting in part).

reason to do so, in that widely dispersed benefits and costs suggest that the classification was not procured solely to benefit a discrete special interest group or to affect adversely another group.[62] Thus, issues of the legitimacy of the legislative purpose do not arise. Professor James Q. Wilson has observed that under such conditions, "[i]nterest groups have little incentive to form around such issues because no small, definable segment of society . . . can expect to capture a disproportionate share of the benefits or avoid a disproportionate share of the burdens."[63] All else being equal, statutory classifications of this type should be expected successfully to pass low-level scrutiny. Equal protection challenges tend to focus on unfair burdening rather than unfair benefitting of other persons.

Advocates of rigorous versions of low-level scrutiny, or of even more intensive scrutiny, often seek to stand the above analysis on its head by arguing that at least some instances of widely dispersed burdens, apart from the burdening of suspect classifications, simply bespeak the political powerlessness of the burdened classes. It seems undeniable that classes such as future medical malpractice victims with injuries of a kind or severity not fully compensated under a new statute or future automobile guest passengers who will be negligently injured are in a sense politically powerless,[64] in that they currently face high costs of organization for later collective benefit.[65] Such classes may well be less easily organized and mobilized than the beneficiaries of classifications that burden them. This is especially true if one makes the crucial assumption that the beneficiaries of such classifications are narrow, tightly concentrated, well-organized groups such as physicians or major insurance companies.

Also constitutionally relevant is the fact that the persons burdened by such classifications, including seriously injured malpractice victims and negligently injured automobile guests, are

---

[62] *See* J. WILSON, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 366-70 (1980). *See generally* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[63] Wilson, *supra* note 62, at 367.

[64] *See* Farley v. Engelken, 740 P.2d 1058, 1064 (Kan. 1987) (citing Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 184, 189 (1981)).

[65] *See generally* M. OLSON, *supra* note 62.

hardly discrete and insular minorities[66] in the sense of being historically set apart and treated disparagingly. If they are powerless, they are no more powerless than those with future fully compensable medical malpractice injuries, those who will in the future be injured as taxicab passengers, or even those automobile drivers who will provide transportation for guest passengers.[67]

It is the very reason for their inability to organize at low cost that suggests why a deferential equal protection test is appropriate. The classes referred to above are almost purely nominal or statistical. They are presumably only poorly correlated, at best, with any immutable trait that would assist the powerful in targeting them as victims. It may be assumed that most or all members of the state legislature, and most influential citizens generally, face roughly the same probability as that of ordinary citizens of being a victim of expensive malpractice or of being negligently injured as an automobile guest.

Not only are victims of expensive malpractice or negligent driving not stereotyped or socially stigmatized in the abstract, they are not even concretely identifiable *ex ante*. At the time of enactment of the classification, the legislative enactor recognizes that she may well be acting to her own future detriment. If problems associated with the legitimacy of legislative purpose are set aside for the moment, the nonidentifiability at the time of enactment of the actual future "victims" of the enactment should encourage great confidence in the fairness, if not the wisdom, of the enactment even if "fundamental" constitutional rights are involved.[68] This should, therefore, elicit only the most

---

[66] *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

[67] *Cf.* Henry v. Bauder, 518 P.2d 362, 367 (Kan. 1974) (noting the anomaly of court decisions treating entering automobile guests substantially differently than departing automobile guests, but failing to consider whether either of these two groups was more politically powerless than the other).

[68] The unpredictability of future consequences for the decisionmaker herself of her own present decision is crucial to the argument of writers such as John Rawls. *See* J. RAWLS, A THEORY OF JUSTICE 136-42 (1971) (discussing the "veil of ignorance" device); *see also* R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT 128-29 (1981) (discussing the technique of a decisionmaker imagining herself in the position of each of the affected parties in turn, or imagining herself having an equal chance of occupying the position of any of the parties to be affected by her decision); J. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 84 (1978) (moral judgments referring to concretely identified persons as "universalized" only if reference to such named individuals is replaced

deferential sort of review, which is understood as a test that by its nature and ordinary application recognizes the probable legitimacy of the classification in light of the nature and origin of that classification.

Objection to this approach is possible. One might envision, at least hypothetically, a legislative enactment under which each person in the society would be assigned a unique number. Every year, one number would be drawn randomly out of a drum with the chosen person being put to death with great ceremony. The purposes of the statute and the issue of "fundamental rights"[69] aside, could it not be said that the classification violates the equal protection of the laws? There is, indeed, great concentration of burden, and the burden does seem severe. It is really only our laudable instincts, rather than sound theory, however, that suggest anything other than the most deferential equal protection review. All persons are equally, if insufficiently, protected, largely because of the unpredictability *ex ante* of the victim's identity. The statute is, nonetheless, clearly unconstitutional. It is, however, more naturally struck down as a violation of substantive due process,[70] or of the privileges and immunities clause,[71] or of the ninth amendment,[72] or even as a cruel and unusual punishment,[73] than as a denial of the equal protection of the laws.

This analysis allows us to clarify the equal protection issues in a range of cases. The statute at issue in *Jones v. State Board of Medicine*,[74] for example, in effect permitted full recovery for

---

by reference to some general class of persons sharing a relevant trait). It may be noted that if legislators are thought of as risk-averse, they will be especially reluctant to enact a statute that may, unpredictably, turn out to burden their own fundamental constitutional rights, along with the fundamental constitutional rights of others. Of course, a society may be unwilling to risk everyone's fundamental rights, even on an equal protection theory, on the assumption that the members of the legislature will avoid risking their own fundamental constitutional rights.

[69] *See generally* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1981).

[70] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[71] *See* U.S. CONST. art. IV, § 2, cl. 1, and *id.* at amend. XIV, § 1.

[72] *See id.* at amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people").

[73] *See id.* at amend. VIII ("nor cruel and unusual punishments inflicted").

[74] 555 P.2d 399 (Idaho 1976).

medical malpractice victims with injuries not exceeding $150,000, but barred full recovery, or recovery beyond $150,000, for those more seriously injured in such cases.[75] The court formulated the inquiry as whether the classification was "invidiously discriminatory"[76] as against those more seriously injured. The *Jones* court held that the classification would be invidiously discriminatory if it failed to meet the following test: "Does the statute reflect any reasonably conceived public purpose, and does the establishment of the classification have a fair and substantial relation to the achievement of the objective and purpose."[77] Since the lower court had found the statute unconstitutional under strict scrutiny, the court remanded the case to be determined under the standard set out above. Therefore, technically, the lower court was reversed, but the *Jones* court did not find the statute constitutional *per se*.

The term "invidious" is of course richly ambiguous, and its senses vary in their moral import. If "invidious" is taken to mean only "damaging," then the classification is perhaps "invidiously discriminatory" toward those who turn out, unpredictably, to be most seriously injured. All classifications that impose burdens will then, however, be "invidious" and unconstitutional. In the more useful sense of the term "invidious," when an intent to deprecate is implied, or at least some unsympathetic state of mind toward the victim exists, the classification is plainly not "invidious." Victims of serious medical malpractice injuries are neither stigmatized in the abstract nor thought to be concretely identifiable in advance. The most deferential scrutiny is therefore owed.

A difficult test of the *ex ante* identifiability approach is provided by the recent case of *Park 'n Fly v. City of South San Francisco*.[78] The fairness of a business license tax is normally tested by deferential standards.[79] In this case, however, the plaintiff claimed that the ordinance in question was drafted to apply to only two taxpayers, so as to increase the City's business license

---

[75] Jones, 555 P.2d at 410.

[76] *Id.*

[77] *Id.* at 411.

[78] 234 Cal. Rptr. 23 (Ct. App. 1987).

[79] *Id.* at 31 (citing Cohan v. Alvord, 208 Cal. Rptr. 421, 425 (Ct. App. 1984)).

tax revenues by fifty percent, and to result in the plaintiff's paying a total of 16 percent of the City's business license taxes.[80] The *Park 'n Fly* court held that the license tax did not violate equal protection.[81] If these allegations had been accepted as true, however, it would have been difficult to argue that the ordinance deserved only the most deferential sort of low-level equal protection scrutiny. This is because the ordinance would, according to the plaintiff's complaint, come close to, in effect, naming a very limited number of parties, concretely identified *ex ante*, to bear an allegedly disproportionate share of the tax burden. If an ordinance singles out by its own terms a particular person, politically powerless or not, for a concentrated burden, much of the reason for great judicial deference to the classification evaporates. The reason for customary judicial deference to legislative determinations is thus absent, and such deference is no longer appropriate.[82]

A similarly interesting, but more unusual, test for the *ex ante* identifiability approach is provided by the case of *Hays v. Wood*.[83] *Hays* involved a state statute that required public officials, who were either attorneys or brokers, to disclose the names of clients providing them with income greater than $1,000 per year. The statute required all other public officials to disclose only the names of clients who provided income greater than $10,000 per year.[84] The burdened class under this statutory discrimination was, at least initially, concretely identifiable at the time of the enactment. The discrimination does certainly seem "invidious" in the sense of conveying a message of distrust for lawyers and brokers. Great judicial deference would, therefore, seem inappropriate. Depending on the facts, this statutory classification might well deserve only the most minimal scrutiny. Such limited scrutiny would be appropriate to the extent that incumbents were not advantaged, which seems evident, and to

---

[80] *Id.*

[81] *Id.* at 32.

[82] *Cf.* Kramer v. Union Free School Dist., 395 U.S. 621, 628 (1969) (when the assumption of fair legislative representation is challenged, judicial deference based precisely on a general assumption of fair representation is not appropriate).

[83] 603 P.2d 19, 160 Cal. Rptr. 102 (1979) (en banc).

[84] *Id.* at 21, 160 Cal. Rptr. at 104.

the extent that the burdened classes are voluntarily imposing the burden on themselves. A rare instance of a group of public officials voluntarily undertaking to predictably disadvantage themselves, thereby calling into play the legal maxim of "volenti non fit injuria,"[85] is to be encouraged by judicial deference.[86]

III. THE DETERMINATION OF STATUTORY PURPOSES AND GOVERNMENTAL INTERESTS

The previous section has argued that the inability of the enacting legislature to identify in advance the particularly affected individuals under a statutory classification is ordinarily a strong indicator of the compatibility of the classification with the equal protection clause.[87] This holds especially true within the typical context of low-level equal protection cases in which no suspect or quasi-suspect classification or fundamental right is present.[88] The argument could be equally as valid by omitting this qualification. One must be willing, however, to stipulate that if a classification predictably will exclusively disadvantage only some members of a powerless racial minority, without the precise identity of the individual victims within that racial category being further predictable, then the level at which the victim must be reasonably predictable, in order for the classification to be tainted, must be the level of the racial group itself. Reformulating the argument in this way does not raise a matter of principle. Nevertheless, it seems clear that under familiar equal protection tests, some account should be taken of a further

---

[85] The policies underlying the doctrine of voluntary assumption of a known, understood, and fully appreciated risk do not dissolve merely because the "risk" of injury is understood to be a certainty.

[86] An analogue to this perspective is occasionally taken even in suspect classification, strict or quasi-strict scrutiny, equal protection cases, as in the voluntary, or allegedly voluntary, affirmative action cases. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1844-45 n.1, 1850 n.5 (1986) (plurality opinion) (lack of clarity as to degree and scope of voluntariness of the assumption of the burdens of the affirmative action plan). Justice Powell's plurality opinion observes that "when a state implements a race-based plan that requires . . . a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan." *Id.* at 1850 n.8.

[87] *See supra* notes 60-86 and accompanying text.

[88] *See supra* notes 1-3.

problem. At least in principle, a classification could be unpredictable in its burdening at the individual level yet still be motivated solely by, or somehow in furtherance of, only an illegitimate legislative purpose.[89] Whether this is really a matter of the equal protection of the laws, rather than, for example, due process, is doubtful.[90] The courts often insist, however, on an equal protection rubric,[91] and therefore this Article must consider the legitimacy-of-purpose problem as well.

The legitimacy-of-purpose problem involves not only an evaluation of the legitimacy of the detected or ascribed legislative purpose, but also a difficult preliminary inquiry into how broadly a court should hunt for purposes, reasons, or even mere consequences, that may justify a statutory classification. It is often thought impossible or unhelpful to determine the intent of a continuing, multi-member legislative body. It is also not immediately clear whether a sensible equal protection test should recognize hypothetical, or merely conceivable, legislative purposes, or content itself with actual collective legislative intent, as subjectively felt or somehow objectively expressed, at the time of statutory enactment. However ascertained, such purposes, legitimate or illegitimate, may be multiple, or a complex tradeoff maximizing no single value. Finally, courts should arguably not confine their search to such intentions, beliefs, and suppositions as the enacting legislature actually entertained or even might have entertained, as opposed to justifying a classification through unintended, later-accruing benefits or arguably favorable consequences. Certainly a governmental "interest," to which a classification might be rationally related,[92] need not have been recognized as a governmental interest, or even recognized at all, by anyone at the time of enactment. A society might have an interest served by a classification in the absence of any intent,

---

[89] *See, e.g.,* Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[90] *See supra* notes 69-73 and accompanying text.

[91] *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (fundamental right to marry and procreate case decided on equal protection grounds); Skinner v. Oklahoma, 316 U.S. 535 (1942) (involuntary sterilization case decided on the basis of a fundamental interests equal protection standard). *But see* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (family living arrangement case decided under the due process clause of the fourteenth amendment).

[92] *See supra* note 5 and accompanying text.

or subjective purpose, to promote that interest. There is thus no initial reason to suppose that statutory classifications need be justified by reference exclusively to purpose, as opposed to the classification's effects on or consequences for one or more purported arguable governmental interests. Because much of the case law and scholarly literature focuses narrowly on governmental purpose and related concepts, however, it is best to begin there.

The common, but mistaken, view that applying low-level equal protection scrutiny virtually ensures that the classification will be held not to violate the equal protection clause[93] is based, in part, on the assumption that the requirement of furtherance of at least some sort of governmental purpose is met by any legislative classification.[94] Under this approach, low-level scrutiny is practically meaningless, if not tautological. A related view, but one which does not support the conclusion that low-level scrutiny tests are almost invariably passed, is that low-level equal protection tests are almost limitlessly arbitrary. Professor, now Judge, Linde expressed this notion in the following terms: "The outcome of an attack on the rationality of a law clearly can be made to depend on whether the law is described as a means toward a somewhat remote end or as very close to an end in itself."[95] In the language of interests rather than purposes, it has been suggested that "[b]ecause classifications always further *some* interest, findings of rationality or irrationality ultimately hinge upon the Court's choice of interests to evaluate and its characterization of such interests."[96]

---

[93] *See, e.g.*, Hays v. Wood, 603 P.2d 19, 21-22, 160 Cal. Rptr. 102, 114-15 (1979) (Mosk, J., concurring) (rational relationship test "virtually always met" and the result "foreordained"); *see also* Perry, *supra* note 33, at 1070 ("the rationality requirement is largely inconsequential as a constraint on the power of government"); Claremont McKenna College v. Estate of Rose, 240 Cal. Rptr. 295, 296 (Ct. App. 1987) (referring to "one of the few cases to strike down a legislative classification for lack of a rational basis").

[94] *See* Perry, *supra* note 33, at 1070; *see also* Bennett, *supra* note 31, at 1059 (1974) (invariably possible to construct a fictionalized statutory "purpose" perfectly accomplished by the statutory classification).

[95] Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212 (1976).

[96] Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1192 (1986); *see also* Note, *supra* note 34, at 137 (positing that it is "always possible" to ignore, oversimplify, or invidiously redefine a legislative purpose).

It may perhaps be true that technically it is "always possible"[97] for a court to characterize the legislative purpose or intent in whichever way it wishes. It is crucial to recognize, however, that while one or more presumed legislative purposes are susceptible to diverse characterization, sheer plausibility sets important practical limitations on the scope of the court's discretion in this regard. A purpose may be expressed in narrower or broader terms, and not all purposes need be narrowly instrumental; a legislative classification might have a merely expressive, symbolic,[98] or what might be called a quasi-performative[99] purpose. There are limits, nonetheless, beyond which it becomes simply unconvincing to expand, to narrow, or to render self-fulfilling an alleged legislative purpose.

Suppose, for example, that a legislature establishes a statutory distinction between insured and uninsured motorists, or between tax delinquents and non-tax delinquents. No doubt it is possible in principle for a court to characterize these classifications as wildly overinclusive or underinclusive.[100] As a practical matter, any judicial claim that the classifications are substantially overinclusive because the legislature sought to burden only those within the burdened categories who are deeply morally culpable, or that the classifications are substantially underinclusive, because the legislature sought to burden all sorts of socially disfavored conduct in general, is utterly implausible. The range of judicial manipulability of the breadth or narrowness of legislative purpose is set not in logic,[101] but in practical plausibility.

The result is the same when we consider the possibility that a statutory classification burdening some persons and benefitting others might be intended not to aim at accomplishing some sort

---

[97] Note, *supra* note 34, at 137.

[98] *See generally* M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

[99] *See generally* J. AUSTIN, HOW TO DO THINGS WITH WORDS (1964) (the author discusses "performatives," or indicative-mood phrases that themselves constitute the presumably successful performance of an action, and are therefore not dependent upon contingent events, beyond context and convention, for their sense and rationality. A simple example would be "I promise," which, if it makes any statement at all, is "self-fulfillingly" true).

[100] *See supra* notes 33-42 and accompanying text.

[101] *Cf.* Note, *supra* note 34, at 137 (focusing on the range of broader or narrower possible state purposes).

of extrinsic task, but simply to "make a statement," to express a sentiment, or to stand as a "symbol."[102] The goal of such a statute, if it has a goal at all, is clearly not very far off; the publication of the statute is "very close to an end in itself."[103] Such statutes are still meaningfully subject to review for the relation between intent and classification. They are not self-justifying in this sense. Symbolic or expressively intended classifications may, conceivably, miss the mark, or lack plausibility. A legislature or a court cannot immunize a statute from intelligent purpose-oriented review merely by declaring, or finding, that it is intended to operate expressively as, for example, a symbolic tribute or gesture of appreciation toward Vietnam veterans. Such a declaration or finding may simply be generally implausible, and hence insufficient, if it is apparent from the text, legislative history, or historical context that the statute has nothing specially to do with Vietnam veterans, or else imposes what looks unequivocally like a burden, such as a special five dollar tax, on Vietnam veterans. Practical plausibility again sets limits on the statute's vulnerability to judicial manipulation of the equal protection inquiry into legislative purpose.[104]

Although the inquiry into legislative purpose is therefore more meaningful than is often supposed, this is not to suggest that it is not problematic. While courts often seek to ascertain the conscious or purposeful collective intent of the legislature,[105]

---

[102] A legislative declaration "conferring honor" upon a distinctive group, such as the Boy Scouts, would count as an example. For other, real-world examples, see the list compiled by Professor Frank Michelman in Michelman, *Politics and Values Or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487, 508 (1979).

[103] Linde, *supra* note 95, at 212.

[104] It is often suggested that at least some statutes are not intended to "accomplish" something, or fulfill some legislative purpose or goal but are simply non-teleological interest group "deals," reflecting merely the vector of political forces. *See, e.g.*, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Even so, if everyone affected by the statute is unexpectedly made worse off because of unanticipated consequences, the statute might be struck down not merely because no purpose can be detected that qualifies as legitimate or public-interested, but because the statute has failed of its essential private-interest purposes. *See id.* at 551. A rent control statute could be considered an interesting example of the foregoing.

[105] *See, e.g.*, Cooper v. Bray, 582 P.2d 604, 612, 148 Cal. Rptr. 148, 156 (1978) (en banc).

this process is notoriously difficult.[106] Inquiry into the subjective motivation of legislators is perhaps even more difficult[107] and judicially disfavored.[108] A theory of equal protection, therefore, should rely as little as possible, as does the theory prescribed herein, on attempts to ascertain legislative motive or intent. Nevertheless, in a limited range of cases, intent and even motive may seem as relevant as actual consequences and effects. Whether or not a statutory classification "counts" as a slur or a disparagement may depend upon whether it was so intended by one or more legislators whose votes were required to enact the legislation. In such cases, reviewing courts must simply piece together the best evidence of intent or motive available.[109] Even in this context, however, "victim" identifiability *ex ante* may provide some useful guidance to the reviewing courts.

One important means of limiting the need for the courts to rely on the probing of legislative motive, and even legislative intent, is to recognize that statutory classifications do not violate the equal protection clause merely because they can only be justified, currently or even at the time of enactment,[110] by reference to hypothetical states of affairs or to merely conceivable public purposes. It has been suggested that justifying statutory classifications by reference to merely conceivable, or reasonably conceivable purposes, in effect tests only the limits of the reviewing court's imagination, and amounts not to judicial deference, but to judicial abdication.[111]

Let us suppose that the statutory classification was intended to serve a single purpose, or even a complex mixture of purposes,[112] but that the logic of, or the factual foundation for,

---

[106] *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 261-93 (1985); Easterbrook, *supra* note 104; Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLICY 59 (1988).

[107] *See* R. POSNER, *supra* note 106, at 267 ("[c]ourts do not have the research tools needed to uncover the motives behind legislation").

[108] *See, e.g.*, County of Los Angeles v. Superior Court, 532 P.2d 495, 501, 119 Cal. Rptr. 631, 637 (1975) (en banc).

[109] *See id.*

[110] *See* Linde, *supra* note 95, at 215 ("[t]he problem of time is whether a law is to be judged for its rationality when it was enacted or at the time when it is challenged").

[111] *See, e.g.*, Jones v. State Bd. of Medicine, 555 P.2d 399, 411 (Idaho 1976).

[112] *See, e.g.*, Pennell v. City of San Jose, 108 S. Ct. 849, 859 (1988) (recognition of the possibility of combinations of purposes).

such purpose or purposes has completely evaporated over time. Typically, the actual consequences of the statutory classification are not entirely foreseen by any member of the enacting majority. Some of these unforeseen consequences may be generally considered undesirable.[113] Other unforeseen, and therefore unintended, consequences will be widely thought of as desirable.[114] To require a legislature to reenact verbatim a statute merely because the currently reasonable justification did not exist at the time of enactment is not merely wasteful but a judicial impertinence as long as certain minimum requirements were met at the time of enactment. Chief among such requirements, as discussed above,[115] is the view that no violation of equal protection should ordinarily be found if the distribution of benefits and burdens under the statute is unpredictable at the level of individuals[116] by the enacting legislators[117] at the time of enactment.[118] While the courts continue to be divided on the propriety

---

[113] Consider, for example, the inequities and the reduction in the supply and maintenance of affordable rental housing under a typical residential rent control program.

[114] Professor Bennett cites the national 55 mile-per-hour speed limit as intended to serve the purpose of conserving gasoline, but as also operating, even in periods without fuel shortages or high oil prices, to reduce significantly the number of traffic fatalities. Bennett, *supra* note 31, at 1074.

[115] *See supra* notes 60-86 and accompanying text.

[116] Focusing on individuals suffices for most of the common cases, but there may well be cases in which particular families or groups such as races or classes, are predictably burdened, and where this seems relevant to the equal protection issue. Of course, if a classification is thought to violate equal protection merely because it predictably burdens specially one fluid social or economic class or another, most ordinary legislation will be struck down.

[117] This is not to suggest that the unpredictability of burdening or benefitting at the individual level is a necessary, rather than a generally sufficient, condition for finding no violation of equal protection. A statute that imposed a thousand dollar tax on every aluminum can-producing plant in order to fund an aluminum can recycling project could well be constitutional, despite the fact that the initial incidence, or burden of the tax, is quite predictable at the level of individual plants, or owners, at or prior to the time of enactment.

[118] One might envision complicating circumstances. Suppose a legislature enacts a statute imposing a ceiling on medical malpractice injury recoveries, without the slightest ability to foresee who, in particular, will be disadvantaged by the statute because of an unusually expensive malpractice injury. Scientists then discover, remarkably, that all of those and only those persons with a particular length forefinger become victims of unusually expensive malpractice injuries. Legislators, along with the rest of us, can now know with certainty who is and is not doomed to eventually feel the burden of the

of justifying classifications by recourse to conceivable, or to reasonably conceivable, purposes,[119] it is clear upon analysis that whatever reasons exist for striking down classifications justifiable only on such bases, they are not reasons of equal protection. The courts rightly impose more exacting standards on the pronouncements of nonelected governmental administrative agencies,[120] but legislation enacted by a popularly representative legislature under the conditions specified above need not be subjected to such scrutiny in the name of equal protection.

Of course, what might be called the "lapsed purpose" case does not exhaust the range of special problems associated with an ascertained legislative intent. Sometimes, the legislative purpose may seem constitutionally illegitimate. The courts have traditionally felt it appropriate to strike down legislative classifications on that basis.[121] Also, a court may find that the only reasonably detectable public interest or purpose intended to be served by a statutory classification is, in practice, actually being

---

statutory classification. The thesis developed in this Article requires either that this state of affairs not constitute a violation of equal protection, or that it be viewed as an unusual aberration, not substantially impairing the ordinary utility of the approach suggested herein.

[119] *Compare* Cory v. Shierloh, 629 P.2d 8, 13-14, 174 Cal. Rptr. 500, 505-06 (1981) (explicit consideration of what the enacting legislature "may" or "might" have thought) *and* Hinman v. Dep't of Personnel Admin., 213 Cal. Rptr. 410, 417 (Ct. App. 1985) (judicial consideration of the legitimate state interest in promoting marriage even though "promoting marriage is not one of the express purposes of the Act") *with* Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983) (inquiring "whether the classifications rationally further a purpose articulated by the state") *and* Fein v. Permanente Medical Group, 695 P.2d 665, 683-84, 211 Cal. Rptr. 368, 386-87 (1985) (en banc), *appeal dismissed*, 474 U.S. 892 (1985) (permitting recourse to hypothetical reasonable legislative intent, but disclaiming recourse to "invented fictitious purposes that could not have been within the contemplation of the Legislature") *and Cooper*, 582 P.2d at 612, 148 Cal. Rptr. at 156 (finding it "difficult to attribute to the Legislature a conscious intent to protect negligent drivers from liability for injuries which they inflict upon owner-passengers").

[120] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-57 (1983) (setting aside informal agency rulemaking because of the agency's perceived failure adequately to consider and to discuss important alternative policy choices); Hampton v. Mow Sun Wong, 426 U.S. 88, 104-05 (1976) (a plausible governmental objective not credited because it was assumed not to have motivated, within the scope of their assigned responsibilities, the various particular agency defendants); SEC v. Chenery Corp., 318 U.S. 80, 87-90, 93-95 (1943) (declining to validate an administrative order on any grounds other than those actually relied upon by the agency).

[121] *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (legitimate state interest required).

disserved, or only minimally served.[122] In fact, appellate courts have occasionally gone so far as to hold legislative classifications violative of the equal protection clause on the remarkable basis that a trial court's finding of no legitimate purpose for the classification was, if not actually convincing to the appellate court, at least not "clearly erroneous."[123] Others have abused the concept of judicial notice by purporting to take "judicial notice" of the correctness of a controversial approach to an obviously complex issue of policy and empirical fact.[124]

Such courts, under the guise of detecting the advancement of no legitimate state purpose by the statutory classification, ordinarily either reweigh the balance of the interests involved[125] or presume to weigh the persuasiveness of the factual and policy "evidence" much like a legislature.[126] While no court concedes that it is in fact questioning "the wisdom or desirability of legislative policy determinations,"[127] many succumb to the temptation to disregard the limitations of their constitutional role, as well as the limits of their practical institutional capabilities.[128]

---

[122] *See, e.g.*, Crowe v. Wigglesworth, 623 F. Supp. 699, 706 (D. Kan. 1985) (federal trial judge "not at all persuaded" by the policy logic of the state legislature; in the legislature's "haste," it "overlooked or, more likely, ignored" the line of causation persuasive to the judge deciding the case); Farley v. Engelken, 740 P.2d 1058, 1067 (Kan. 1987) ("[w]hile the legislature's purpose in enacting [the statute] may have been to increase the quality and availability of health care, application of such a statute is counterproductive"); Duerst v. Limbocker, 525 P.2d 99, 103 (Or. 1974) (en banc) (if a classification is to be found irrational, the court "must be prepared to point to factual data which disproves, or experience which belies, the legislative assumptions upon which the legislation is based").

[123] *See* Arneson v. Olson, 270 N.W.2d 125, 136 (N. D. 1978).

[124] *See Boucher*, 459 A.2d at 93 (relying on judicial notice as well as "a plethora of facts" to substantiate a trial court "finding" that no malpractice crisis existed as of a particular year after the enactment of the legislation).

[125] *See, e.g.*, Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 366 (Tex. Civ. App. 1985) (finding insufficient "quid pro quo" to justify restrictions on medical malpractice actions and ignoring the possibility that the benefits of reduced insurance premiums may tend to accrue only after the statute is judicially upheld). The court also entirely ignored the possible benefit of maintaining the sheer availability for many citizens of physicians' services. *Id.*

[126] *See supra* note 122.

[127] *See, e.g.*, Florida Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783, 789 (Fla. 1985) (per curiam) (quoting *Dukes*, 427 U.S. at 303).

[128] *Cf.* Georgie Boy Mfr., Inc. v. Superior Court, 171 Cal. Rptr. 382, 386 n.4 (Ct. App. 1981) (noting, with regard to an issue mixing empirical fact and public policy, that "the Legislature is set up to schedule hearings and to probe this issue; the courts are not").

Given the unavoidable limitations on the legislature's own practical ability to revise or to withdraw obsolete or failed statutory initiatives,[129] and the interest group pressures that may discourage them from doing so,[130] one is tempted to adopt an expansive view of a court's authority to overturn legislative initiatives on grounds of their present illegitimacy. Ideally, courts would recognize, accurately and at a reasonable cost, statutory classifications that do not promote a significant current public interest, or that primarily promote merely a "private" interest. Such classifications may legitimately be held unconstitutional on that basis. Professor Cass Sunstein has shown that the "legitimate purpose" inquiry in equal protection cases is merely one manifestation of a broader constitutional concern for the evil implicit in "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to get what they want."[131]

Of course, those persons or groups able simply to extract transfers for their own benefit, regardless of who else is benefitted or harmed, cannot be counted on to acknowledge that they fit within this category. Presumably, groups deploy an ideology partly to obscure just such phenomena, making reliable detection of mere power-based statutory initiatives difficult for the judiciary. Even if it is assumed that what the raw-power exercising group wants is to benefit only itself, and no others, even indirectly, there is no consensus that such political activity is morally or constitutionally illegitimate.[132] In fact, it does not

---

[129] *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-7 (1982) (discussing the possibility of an activist judicial response to the problem of statutory obsolescence).

[130] *See* M. OLSON, THE RISE AND DECLINE OF NATIONS 58-65 (1982) (stable system of special interest groups retards efficient societal adaptation generally).

[131] Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984). For a discussion of the nature of "faction" see also THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1961).

[132] *See, e.g.*, R. POSNER, *supra* note 106, at 265 ("[i]t should be possible . . . to classify statutes according to whether they advance the public interest or advance instead the interest of some (narrow) interest group"); Linde, *supra* note 95, at 211, 246 (common and appropriate for legislation to be intended simply to favor one group rather than another); Note, *supra* note 96, at 1206 (same). *Cf.* R. POSNER, *supra* note 106, at 274 ("[s]ince it is inevitable that interest groups will influence the legislative process, it

seem unusual for legislation procured solely in order to benefit the narrow, procuring "faction" to benefit, directly or indirectly, a broad spectrum of the public.[133] Assume, for example, that an automobile guest statute was enacted at the behest of liability insurance companies solely on behalf of their shareholders.[134] We should still be reluctant to allow a court to make the controversial empirical or policy-laden determination that liability insurance premiums for most drivers would be no higher if the guest statute had not been enacted, or that the hospitality justification for the guest statute is somehow fatuous or insufficient in a society increasingly thought to be unduly litigious.

Typically, then, it is inappropriate to entrust courts with the task of sorting out statutes with sufficient, or necessary, legitimate public purposes and statutes lacking in such purpose, given the potential for abuse, judicial arbitrariness, and judicial error. Most of the value that might result from the ideal operation of a "legitimate purpose" inquiry can be derived from the simpler, more objective, less manipulable, less demanding inquiry endorsed above.[135] Those eventually burdened by a statutory classification would thus be substantially identifiable *ex ante*, at the level of individual persons, by the enacting legislature. If it were typically thought necessary to inquire judicially into the permissibility of the legislative purpose, this Article would suggest simply that the legitimate legislative purpose inquiry be "operationalized" as the judicial inquiry into *ex ante* substantial identifiability of those individual persons burdened by the statutory classification.

CONCLUSION

For the vast range of equal protection cases, the crucial judicial test should be the *ex ante* individual identifiability, by the enacting legislature, of the immediate or eventual "losers,"

---

cannot be right to invalidate legislation just because it was procured by an interest group").

[133] See the examples referred to by Professor James Q. Wilson in Wilson, *supra* note 62, at 369.

[134] *See* Brown v. Merlo, 506 P.2d 212, 225, 106 Cal. Rptr. 388, 401 (1973) (en banc).

[135] *See supra* notes 60-86 and accompanying text.

or those disproportionately burdened by the statutory classification. This relatively simple inquiry captures most, if not all, of the potential benefits ideally available from alternative formulas, while limiting the potential for judicial arbitrariness, error, or invasion of the legitimate sphere of a democratically elected legislature.

As discussed above,[136] this test is not empty or invariably met. Still, some will be disappointed that it will result in the judicial approval of a wide range of arguably ill-considered legislation, at least if the judicial challenge is confined solely to an equal protection theory.[137] Such a reaction may bespeak an adherence to a questionable model of constitutional tests. A "low-level" equal protection test need not be thought of as analogous to a fishing net, which is presumably working at its optimum level only when it catches plenty of fish. To assume that a low-level equal protection test is working properly only when it actually strikes down a substantial proportion of the statutes it tests is arbitrary at best, or at the very least it is a worrisome preoccupation for legislators seeking to comply with its requirements. If some model or another is insisted upon, one might think in terms of a fire alarm. One does not evaluate the soundness of design and operation of a fire alarm by the sheer frequency with which it is triggered. One instead wants such a fire alarm to sound at only the right times. This Article has presented a simple judicial test with these virtues in mind.

---

[136] *See supra* notes 78-86 and accompanying text.

[137] Potential alternative avenues of constitutional attack, listed *supra* in text accompanying notes 70-73, may be more appropriate.